COLUMBIA LAW REVIEW.

VOL. XI. JUNE, 1911. No. 6

COMPROMISE—THE GREAT DEFECT OF ARBITRATION.[1]

"Thus Peace is maintained by justice, which is the fruit of Government as Government is through society and society from consent."[2]

"Il faut nous bien tenir à l'idée que l'arbitrage n'est un instrument de paix que parce qu'il est un instrument de justice."[3]

"The respect for the rights of others is peace" was a famous saying of a great Mexican patriot, lawyer and statesman, whose whole life was consecrated to the endeavor to establish the reign of law but whose entire career by the bitter irony of fate was spent in the midst of warfare. For Juarez found, as many great and good men have found before and since, that the world is full of those who are not yet willing to respect the rights of others, and as he was unable, owing to adverse circumstances, to secure justice for his countrymen through law, they took up arms to obtain justice through force.

Force and law have long been competitors and rivals in the history of the individual. For hundreds of years trial by combat and trial by jury were competing remedies in England and only by slow, painful degrees did trial by jury prove its fitness to survive because it was a cheaper, surer, better way of obtaining justice.

In the same way arbitration and war are now competing remedies. War is "the state in which a nation prosecutes its right by

[1]This article is based on an address delivered at the Third National Peace Congress, Baltimore, May 3d, 1911. Notes and references have been added, but in general the form and phraseology of the original address have been preserved.

[2]William Penn, An Essay toward the present and future peace of Europe, etc.

[3]Ruy Barbosa, Deuxième Conférence de la Paix, Actes et Documents, II: 367.

force,"—arbitration is, or ought to be, an appeal to reason to do justice according to law. History seems to show that rightly or wrongly nations like men will continue to appeal to force to secure what they deem to be their just rights until they become convinced that there is some surer, better way of obtaining justice, and arbitration can only hope to replace war as it demonstrates its superiority in actual practice. *Prima facie* this would not seem to be a very severe requirement, for it would appear that anyone who looks at the matter philosophically must admit that the worst arbitral sentence which has ever been rendered is infinitely more to be desired than any war, but unfortunately most men are not philosophers and they cannot be expected in weighing the relative advantages of arbitration and war to consider ultimate results. If the municipal courts only replaced private warfare among individuals after the courts had been brought to a relatively high state of perfection through long experience, it can hardly be expected that nations will be more reasonable than men or that they will discard their swords for ploughshares in order to submit their difficulties to tribunals less efficient than those which have been found necessary for the settlement of disputes among men. In other words, it is reasonable to suppose that before international arbitration can banish warfare it must afford at least as satisfactory a method of obtaining justice between nations as our municipal tribunals now afford between individuals.

It therefore becomes the most pressing duty of the hour for all those interested in the abolition of war to study the present system of international arbitration with a view to so eliminating its defects that it may speedily emerge victorious in the struggle for the survival of the fittest which is now going on between arbitration and war.

The most striking characteristic of arbitration as it exists today between individuals, as a supplement to the regular courts,—a characteristic which is peculiarly apparent when arbitration is applied to matters of general public interest, such as labor disputes,—is the almost irresistible tendency shown by arbitration to compromise and split the difference instead of doing justice though the heavens fall.[4]

Almost every American who has represented the United States before an international tribunal has made of record his conclusion

[4]See the "Defects of Arbitration as a Means of Settling International Disputes," President Eliot, 73 Advocate of Peace 57, March, 1911.

that international arbitration shows the same tendency. Gallatin, who represented the United States in the *Northeastern Boundary Arbitration* with Great Britain, correctly foresaw the results of that and many other arbitrations when he said:

"An arbitrator, whether he be king or farmer, rarely decides on strict principle of law, he has always a bias to try if possible to split the difference."

And General Harrison, counsel for Venezuela in the *British Guiana Boundary Arbitration,* General Foster, agent of the United States in the *Behring Sea* and *Alaska Boundary Arbitrations,* Mr. Carter, counsel in the *Behring Sea Arbitration,* and Mr. Root, counsel for the United States in the recent *North Atlantic Coast Fisheries Arbitration,* all have told the same story.[5]

[5]General Harrison's argument in the British Venezuela Boundary Dispute, Proceedings, II, pp. 2981 *et seq.,* cited by Genl. Foster, Proceedings American Society of International Law, 1909, p. 29. See also, address of Honorable John W. Foster, Proceedings American Society of International Law, *supra,* in which he quotes (p. 30) from a most interesting letter of Mr. Carter's to the Secretary of State, in which Mr. Carter says, having reference to the Behring Sea Arbitration: "Compromise of some sort seems to have been the necessity of the situation; and when this is said, it means that the Tribunal was no Court at all, but a body of men aiming to reach a solution which would either equally please, or equally displease, the contending parties. Our friend Judge Hoar of Massachusetts is said to have observed that the circumstances which he felt to be the most disagreeable to him in his official life was that he was never able to decide against both the parties. A place on the present Tribunal would have suited him to a charm."

Mr. Root, addressing the National Arbitration and Peace Conference of 1907, as Secretary of State, on the eve of the Second Hague Conference, said: "* * * arbitrators too often act diplomatically rather than judicially; they consider themselves as belonging to diplomacy rather than to jurisprudence; they measure their responsibility and their duty by the traditions, the sentiments and the sense of honorable obligation which have grown up in centuries of diplomatic intercourse, rather than by the traditions, the sentiments, and the sense of honorable obligations which characterize the judicial departments of civilized nations. Proceedings Nat. Arb. and Peace Conf. April 15, 1907, 44. And in an address on "The Importance of Judicial Settlement" delivered shortly after his return from the argument of the North Atlantic Coast Fisheries case before the Hague Tribunal, Mr. Root said: "* * * and the inevitable tendency is, and the result often has been, in the majority of cases has been, that the arbitral tribunal simply substitutes itself for the negotiators of the two parties, and negotiates a settlement. Well, that is quite a different thing from submitting your views of right and wrong, your views of the facts and the law on which you base your claims to right, to the decision of a tribunal, of a court. It is merely handing over your interests to somebody to negotiate for you; and there is a very widespread reluctance to do that in regard to many cases; and the nearer the question at issue approaches the verge of the field of policy, the stronger the objection to doing that." Address by Senator Elihu Root at the first national meeting of the Society for the Judicial Settlement of International Disputes, Washington, D. C., December 15, 1910, printed as publication No. 4 of the Society, pp. 7-8. Reprinted in 73 Advocate of Peace 81-83, April, 1911.

Passing from the argument from analogy and the argument from authority to the argument from history, a necessarily brief review of the actual results in certain typical and important arbitrations fully sustains the conclusions reached by the American lawyers and statesmen who have had the best opportunity to judge arbitration at first hand. Take, for instance, what may perhaps be fairly regarded as five typical and leading arbitrations in which the United States and Great Britain were concerned prior to the inauguration of the Hague Tribunal.[6] The arbitration between the United States and England over the Northeastern boundary before the King of the Netherlands under the treaty of September 29th, 1827; the Alabama arbitration with Great Britain under the treaty of Washington; the arbitration between the United States and Great Britain regarding the Northwestern or San Juan boundary before the Emperor of Germany, under other articles of the same treaty; the *Behring Sea Arbitration* with Great Britain, and finally, the arbitration between Great Britain and Venezuela over the British-Guiana boundary, which, in view of the circumstances may well be classed with the other Anglo-American arbitrations.

In the first of these cases, the *Northeastern Boundary Arbitration,* the royal arbitrator frankly admitted his inability to render a judicial decision and recommended a compromise line, a course which amounted to such a clear departure from the terms of the submission that the United States refused to abide by the award and Great Britain acquiesced in this decision.[7] And it is gen-

The following passage is extracted from an address by President Eliot likewise delivered before the first meeting of the American Society for the Judicial Settlement of International Disputes.

"* * * Furthermore, the temporary tribunal, of the single umpire, almost inevitably seeks to discover some available compromise, which will give something to each of the disputants, but to neither its extreme claim. Now, a compromise may be an expedient temporary adjustment; but it is seldom satisfactory to either party, and it often leads within a moderate period to a renewal of strife by one party or the other, or by both,—unless the original dispute was an isolated case which did not arise from any continuous or habitual national activities." "The Defects of Arbitration as a Means of settling International Disputes." Address by President Eliot *supra* 58.

[6]It should be observed that in making this selection all mixed commissions in which no neutral sat have been excluded, as well as claims commissions generally, although one or more of the commissioners may have been non-national, and although in the aggregate the claims coming before such commissions may have reached large amounts and involved questions of great importance in international law. For a discriminating list of the arbitrations of the past century see John Bassett Moore's article, "A Hundred Years of American Diplomacy," 14 Harv. L. Rev. 165, 182-183.

[7]See 1 Moore, International Arbitration 71-136.

erally admitted that the Behring Sea award and the British-Guiana award, however useful they may have been in disposing of very troublesome difficulties which might have led to war, cannot be deemed to rank as judicial decisions.[8] This leaves only the San Juan and Alabama boundary awards which can fairly claim to stand as decisions which, whether right or wrong in their results, were judicial decisions upon the law and the facts as understood by the arbitrators—a ratio of three compromises out of five arbitrations.

Turning to the arbitral decisions of the Hague Tribunal, now nine in number, the result, as was to be expected, is more encouraging. In the first decision of the Hague Court, in the *Pious Fund* case, the Tribunal found in favor of the United States on every point except one, and that one point was of such difficulty that it is believed that no just suspicion that the decision was the result of a compromise can be based on the fact that it was resolved in favor of the defeated litigant. In the next two cases, the *Venezuela Preferential* case and the *Japanese House Tax* case, the decisions were all one way and consequently the idea of compromise, at least as to the result, is precluded, and the same may be said of the recent *Savakar Extradition* case between Great Britain and France.[9] In the fourth and seventh cases before the Hague Tribunal, the case of the *Muscat Dhows* and the *Norway-Sweden Boundary Arbitration,* the decisions, while not absolutely in favor of either party appear to an outsider at least to be so reasonably founded on the law and the facts as to be fairly exempt from the charge of being matters of compromise. Indeed, it is submitted that the Norway-Sweden decision is upon the whole, from a technical point of view, one of the most creditable achievements of the Hague Tribunal.[10] This leaves for discussion the

[8]See General Foster's address, Proceedings American Society of International Law 1909, *supra.*

[9]Of course it might be suggested that the opinions in one or more of these cases have been to a greater or less extent affected by the spirit of compromise, but in this connection it should be remembered that an international tribunal is no more bound than a municipal tribunal to pass upon any point not necessarily involved in the question to be decided, and if the tribunals in these various cases succeeded in finding one ground which seemed to them sufficient upon which to base their decisions, they were clearly under no obligation to pass upon other questions which may have been broached in argument, no matter how interesting or important in the general development of international law.

[10]See address of Jackson H. Ralston, "Some Considerations as to International Arbitral Courts," 73 Advocate of Peace 11, 12, Jan. 1911, where Mr. Ralston says: "The Grisbadarna case is striking in that the

Casablanca Arbitration between France and Germany, the *North Atlantic Coast Fisheries* case between the United States and Great Britain and the *Orinoco Steamship Company* case between the United States and Venezuela.

In the *Casablanca* case the Hague Court probably rendered its greatest contribution, so far, to the peace of the world. That case of all those decided by the Tribunal was sent to the court under the imminent threat of war, and although its decision depended upon matters of law and fact, it also, under the circumstances of the case, was thought to involve what are commonly called questions of national honor. It is an ungracious task to criticise a decision which was accepted as satisfactory by the people of both countries litigant, and which has been of such practical benefit to the world as has this decision, but of course this case cannot pretend, either in the result reached or the opinion rendered to rank as a judicial decision. Dr. Lammasch, four times a member and three times president of the tribunals sitting under the Hague Conventions, has expressed the well-nigh universal opinion when he refers to this case in a recent magazine article as having a "preponderatingly diplomatic character."[11]

As regards the remaining two decisions of the Hague Tribunal, the *North Atlantic Coast Fisheries Arbitration* and the *Orinoco Steamship* case, the situation is more complex. The general result in the *Fisheries* case was a decision in favor of the United States,

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nationals of Norway and Sweden, the contending nations, sat upon the Hague Tribunal, and the conclusion reached was founded upon clear and, as I believe, sound principles of international law."

[11]See Article by Dr. Heinrich Lammasch in Das Recht for March 12, 1911. See also, Mr. Ralston's article *supra*, where he says, referring to this case: "the Court did not particularly concern itself with discussions as to the principles of international law, a course doubtless wise under the circumstances." See also an interesting and exhaustive article by Professor Gilbert Gidel, "L'Arbitrage de Casablanca," in the *Revue Générale de Droit International Public* (Fauchille) 1910, No. 4, pp. 326-407. From this article the following sympathetic comment on the decision is extracted: "On remarquera la formule très heureuse adoptée par les arbitres: nous nous sommes expliqués assez longuement déjà sur la question de la remise des deserteurs, n'y revenons pas. Signalons seulement le bonheur des expressions employées: il eût été delicat de dire la remise des deserteurs n'est pas accordée; le Tribunal tourne elegamment la difficulté. 'Il n'y a pas lieu, dit-il, de statuer sur les autres demandes,' ce qui écarte d'une manière attenuée et sans la moindre brutalité les pretentions de l'Allemagne."

In order to appreciate the full force of this comment it must be remembered that the terms of the *compromis* (Article 9) expressly made it a duty of the court to determine the situation of the deserters in accordance with the results reached by the decision and that Germany in her case specifically demanded their return.

although some of the American contentions were not sustained, and it would require an intimate acquaintance with and an elaborate discussion of the decision to reach any conclusion as to just how far certain findings of the court were affected by the spirit of compromise. It is significant, however, that Dr. Lammasch, the President of the Tribunal, has himself said, in the article already referred to, that the judgment in the *North Atlantic Coast Fisheries* case "contained elements of a compromise."[12]

Dr. Lammasch defends this course on the ground that "the court had received special and extraordinarily full powers for this purpose." It is submitted with all deference, however, that the very specific and detailed terms of submissions under which the court was sitting will be searched in vain when justly construed for any authority to compromise.[13]

The situation in the *Orinoco Steamship* case in which Dr. Lammasch also presided is much the same. The decision upon the great question of principle involved, the right judicially to revise an international award, and in all its larger aspects is in favor of

[12]Was aber die Schiedssprüche betrifft, so enthielten einige sehr eigehende Begründungen juristischer Art. Insbesondere war dies der Fall bei den drei Sprüchen, bei denen der Verfasser dieses Aufsatzes als Vorsitzender fungierte. (Maskatfall zwischen Grossbritannien und Frankreich, Orinocofall zwischen den Vereinigten Staaten von Amerika und Venezuela, Fall der neufundländischen und kanadischen Fischereien zwischen Gross Britannien und den Vereinigten Staaten von Amerika; freilich enthielt das Urteil im letztgenannten Fall auch Elemente eines Vergleiches; hierzu hatte das Schiedsgericht aber besondere ausserordentliche Vollmacht erhalten.) Aus eben diesem Grunde dürften diese Sprüche auch als Präzedenzfälle Verwertung finden können." Prof. Heinrich Lammasch in "Das Recht," March 10, 1911.

[13]Prof. Lammasch probably had reference to certain provisions in Article 4 of the special agreement signed January 27, 1909, submitting the North Atlantic Coast Fisheries case to arbitration. With respect to the action of the tribunal under this article, Mr. Robert Lansing, one of the counsel for the United States, in an article appearing in the University of Pennsylvania Law Review and American Law Register for December, 1910, and the American Journal of International Law, January, 1911, says: "* * * acting under a strained construction of Article IV of the Special Agreement, which authorized them to recommend to the parties 'rules of procedure, under which all questions which may arise *in the future* regarding the *exercise*' of the treaty liberties (not 'privileges' the word used in regard to bays on the non-treaty coasts) might be determined 'in accordance with the *principles* laid down in the award,' the arbitrators recommended that the parties agree to a series of arbitrary lines, described geographically in the award, as marking the entrance of certain bays, and that the entrance of every other bay should be where it narrows to ten miles. The lines thus proposed and the ten-mile rule are more favorable to American interests, but still very similar to those provided in the unratified Bayard-Chamberlain Treaty of 1888." See 5 American Journal of International Law, 1, 24, 25.

the United States,[14] although the holding of the tribunal on one point resulted in the failure to allow the principal item of damage claimed by this government. The decision has, however, been very sharply criticised in Venezuela in articles which bear every earmark of having emanated from someone connected with the Venezuelan agency at the Hague, chiefly on the ground that it was a compromise.[15] In view of Dr. Lammasch's admission with regard to the *North Atlantic Coast Fisheries* case, and in the light of the terms of submission and the contentions of the parties in the case, counter case and argument, it seems reasonable to infer that certain portions of this opinion, which was likewise written by him, also contain elements of compromise.[16]

[14]Prof. Nys, himself a member of the Hague Tribunal, speaks as follows with respect to the decision of the Tribunal upon the main questions involved in a recent article:

"Le tribunal d'arbitrage admet comme vices entraînant la nullité quelques-unes des décisions du sur-arbitre l'excès de pouvoir, et l'erreur essentielle dans le jugement; il admet que l'excès de pouvoir peut consister non seulement à décider une question non soumise aux arbitres, mais à méconnaître les dispositions impératives du compromis en ce qui concerne les principes de droit à appliquer, il assimile ainsi à l'excès de pouvoir la circonstance que le sur-arbitre a prétendu imposer l'obligation de recourir d'abord à la juridiction venezuelienne et la circonstance qu'il n'a point compris une disposition du code civil venezuelien ou qu'il a commis des erreurs de fait. En tous ces points, le tribunal a sainement appliqué les principes du droit et il convient d'approuver sa sentente. Il convient aussi de s'efforcer d'organiser pour la Cour permanente d'arbitrage elle-même un système de revision plus développé que celui qui a été adopté dans les deux conférences de la Paix."

"La Revision de la Sentence Arbitrale," (1910) 12 *Revue Droit International et de Legislation Comparée* 595, 632.

[15]"El carácter de Cuerpo Diplomático que atribuimos á la Corte Permanente y á los tribunales arbitrales de ella nacidos, está suficientemente comprobado por el espiritu de las decisiones dictadas hasta el día, y al cual, como es fácil comprender, no podía ser extraño el laudo que iba á poner término á la cuestión suscitada á Venezuela por los Estados Unidos de Norte América. Bien es verdad que en esta vez la Corte debía emitir concepto acerca de una cuestión de pura doctrina, íntimamente relacionada con el principio cardinal de la inmutabilidad de las sentencias arbitrales y por de contado, con la suerte de una institución por cuya perdurable vida y sosegado afianzamiento parece estar llamada á velar la Corte Permanente. Pero es el case que, como todos saben, los vicios originarios son dificiles de corregir y que solo argüían bien cuantos perjuzgaron del reciente fallo atenidos á los hechos, á los antecedentes, y no á los principios abstractos." El Universal, Caracas, Nov. 24, 1910.

[16]It seems but fair, however, to quote the following passage from Dr. Lammasch's closing remarks as President of the Tribunal in the Orinoco Steamship Case at the session of October 25, 1910:

"Nous esperons que la Sentence, sur laquelle le Tribunal s'est mis d'accord, contribuera à la stabilité de la juridiction arbitrale en reconnaissant en principe l'immutabilité des sentences arbitrales, tout en admettant que, comme dans l'espèce, l'accord des Parties peut y apporter des exceptions parfois utiles et justifiées. Les decisions sur les différentes réclamations embrassées dans ce litige ne sont que la conséquence logique de ces principes soutenues par le Tribunal." *Protocoles des Seances*, etc. 60.

Summing up the results of this necessarily brief examination of the decisions of the Hague Court, so far rendered, it would seem that there are six decisions which at least, on the face of the record are not open to the criticism that they are based on compromise, so far at least as the actual decisions are concerned; one decision, the Casablanca award, which is unquestionably a compromise and two decisions which are fairly subject to the suggestion that they are, as to some points at least, affected by the spirit of compromise.

Stating this result as strongly as possible against the court, it would give six judicial decisions to three decisions in whole or in part affected by the spirit of compromise, a marked improvement over previous conditions and a very just ground for encouragement; but it remains true, that arbitration even at the Hague Tribunal still frequently results in compromise.

It is, however, a fair question whether or not after all this it can properly be said to be a defect in arbitration, and it has been and is argued by those whose opinions are entitled to the greatest respect, that the tendency of arbitrators to compromise, so far from being a defect is in fact an advantage, or at most, under present conditions, a necessary condition to peaceful settlement. Bourgeois at the Second Hague Conference[17] in discussing the establishment of the proposed permanent court of arbitral justice maintained that even if the new judicial tribunal were established the present so-called Hague Tribunal should be continued for the disposition of matters which the nations were not yet ready to submit to a judicial tribunal, and it has been suggested quite recently that if the proposed judicial tribunal were established, that tribunal and the present Hague Court would "probably operate side by side for several decades before the more perfect one finally supplants the other."[18] It may well be doubted, how-

[17] "Le PRESIDENT (c.-à-d. Bourgeois) estime que la nouvelle Cour ne saurait devenir une plante parasite qui détruirait l'arbre lui-même. Jamais elle ne pourrait résoudre les grands problèmes politiques pour lesquels il faudra une Cour purement arbitrale. Par conséquent il convient de ne rien faire qui puisse mettre dans l'ombre l'institution de 1899. Par contre, l'instrument nouveau est plus précis, il fonctionnera plus rapidement et sa tâche est plus particulière. Il faudrait trouver une formule indiquant qui'il y a un lien entre les deux juridictions; la nouvelle Cour sera, pour ainsi dire, l'instrument permanent de la Cour actuelle." *Deuxième Conference de la Paix: Actes et documents:* II: 598.

[18] "* * * If a regular international court of justice were set up at the present time the governments would almost certainly, in many instances, resort to the arbitration tribunal at The Hague rather than to the court of justice. When the latter is inaugurated, as all pacifists hope

ever, whether there is any real field for admitted compromise outside the domain of diplomacy and mediation. As President Harrison said, when vainly appealing to the Umpire of the British-Guiana Boundary Commission for a judicial decision:

"if conventions, if accommodations, and if the rule of give and take are to be used, then let the diplomatists settle the question. But when these have failed in their work and the question between two great nations is submitted for judgment, it seems to me necessarily to imply the introduction of a judicial element into the tribunal."[19]

If once a judicial tribunal were really established it is believed that there would be little recourse to arbitration before the present tribunal, which would in that event be discredited as an open effort to secure a compromise and would lose its present facility for affording a compromise under the guise of a judicial decision. It is not intended to suggest that a compromise is not frequently, even generally, more to be desired than an international law suit, but it is suggested, that when a compromise is desired diplomacy, mediation, and a reference to an *amiable compositeur* afford ample and open means for reaching this result. Compromise reached through negotiations, diplomacy, mediation, is in the interests of peace and good neighborship; compromise reached by a tribunal such as the Hague Tribunal which is under an obligation to judge according to the law and the facts and which may know little or nothing of the considerations of sentiment and expediency which are properly considered in reaching a compromise, is, it is submitted, in the long run, a stumbling-block in the pathway to peace through justice.

Having reached the conclusion that arbitration has in the past frequently resulted in compromise rather than in justice according to the law, and that this is still the case although in a less degree and that this condition of affairs although natural is most regrettable, it remains to consider briefly the causes of this situation and to suggest some possible remedies. Doubtless it is true that the fundamental cause lies in the nature of arbitration itself

will be the case in the near future, the two tribunals will probably operate side by side for several decades before the more perfect one finally supplants the other." Editorial, 73 Advocate of Peace 4, Jan. 1911. See also an address, "Arbitration Tribunals Still Useful," by Francis W. Hirst, 73 Advocate of Peace 8, Jan. 1911.

[19]General Harrison's argument in the British-Venezuelan Boundary Dispute, Proceedings, 11:2892. Cited by General Foster, *supra* note 5.

for, as Gallatin says "an arbiter, whether he be king or farmer * * * is always biased to try if possible to split the difference." Doubtless it is also true that the fundamental and ultimate remedy, therefore, for compromise in arbitration is to substitute for arbitration a permanent judicial tribunal to do justice between nations,[20] but the difficulties in the way of the establishment and successful operation of such a tribunal are still serious. These difficulties will doubtless all yield in time to intelligent and broad-minded diplomacy, but whether the time required be short as we all hope, or considerable as some of us fear, it is believed that there are certain suggestions which can be immediately put into operation and which will make for the elimination of compromise in arbitration. These suggestions have reference first to the framing of the terms of submission, second to the selection of the judges, and third to the procedure before international tribunals, and finally to the importance of maintaining and perfecting the right to revise and set aside arbitral awards and the establishment of a regular system of appeal in certain cases.

Perhaps no better illustration of the difference between terms of submission framed with a view to a compromise and terms of submission framed with a view to securing a judicial decision can be found than by a comparison of the *compromis* between Germany and France providing for the submission of the Casablanca incident to the Hague Court and the provisions of the Treaty of Washington submitting the San Juan boundary dispute between the United States and Great Britain to the arbitration of the Emperor of Germany.

The Casablanca *compromis* after reciting that the two governments had agreed "to submit to arbitration all the questions raised by the events which happened at Casablanca on the 25th of last September" provided in articles 1 and 9 as follows:

"Article I.—An arbitral tribunal constituted as here stated is empowered to decide the question of fact and law raised by the events which happened at Casablanca on the 25th of last September between the officials of the two governments.

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"Article IX.—After the tribunal shall have decided the questions of fact and law which are submitted to it, it shall determine

[20] See Mr. Root's address on the importance of judicial settlement, quoted *supra*. The Hague Convention expressly provides for mediation, *i. e.*, compromise, and the provisions regarding arbitration look toward a judicial decision.

in accordance therewith the situation of the individuals arrested on the 25th of last September in regard to which there is a dispute."[21]

It may well be that the negotiators who framed the *compromis* in these general terms were really seeking a compromise and not a judicial decision, and this suggestion becomes the more plausible when it is remembered that it is the general understanding that Messrs. Renault and Kriege, respectively the advisers of the foreign offices of France and Germany, framed the terms of the *compromis*[22] and that these same eminent juris-consults were the national members of the Hague Tribunal which rendered the Casablanca award.[23] Under these circumstances it is perhaps not quite fair to score the Casablanca compromise against international arbitration in general. Contrast with the *compromis* in this case articles 34-40 of the Treaty of Washington which provided for the submission of the San Juan boundary dispute to the Emperor of Germany.

It will be remembered that this dispute grew out of the terms of the Treaty of 1846 between the United States and Great Britain, governing the boundary between the United States and Canada west of the Rocky Mountains, which provided for the continuation of the boundary line along

"the 49th parallel of North latitude to the middle of the channel which separates the continent from Vancouver's Island; and thence southerly through the middle of said channel and of Fuca's Straits, to the Pacific Ocean; Provided, however, that the navigation of the whole of the said channel and straits, South of the 49th parallel of North latitude, remain free and open to both parties."[24]

The Treaty of 1846 was negotiated under the threat of the war cry of "Fifty-four forty or fight," as a last effort to prevent

[21]Article I.—Un Tribunal arbitral, constitué comme il est dit ci-après, est chargé de résoudre les questions de fait et de droit que soulèvent les évènements qui se sont produits à Casablanca, le 25 septembre dernier, entre les agents des deux pays." * * *

"Art. IX.—Après que le Tribunal arbitral aura resolu les questions de fait et de droit qui lui sont soumises, il reglera en consequence la situation des individus arrêtés le 25 septembre dernier au sujet de laquelle il y a contestation."

Revue Générale de Droit International Public, No. 4 (1910) 330, 331.

[22]*Revue Générale de Droit International Public,* No. 4 (1910) 329-330.

[23]If this is reason to expect that a case will be compromised instead of decided it would seem most desirable that nationals who understand the questions of policy involved should be members of the tribunal.

[24]Article I, Treaty between the United States and Great Britain, establishing the boundary west of the Rocky Mountains, concluded June 15, 1846. 1 Treaties, Conventions 656, 657 (1776-1909).

war between the two contracting parties. It was a case where it was deemed more important to reach an agreement than to reach a precise and definite agreement,[25] and accordingly the treaty was negotiated, signed and ratified although both parties were aware that the channel between Vancouver's Island and the mainland was filled by an archipelago of islands, through which there was at least two distinct channels, the Canal de Haro and the channel subsequently known as Rosario Straits, one on the British and one on the American side, shown by the maps used by the negotiators, and yet the negotiators contented themselves by referring to the "middle of the channel" without specifying any particular channel.

Under these circumstances it was not remarkable that a dispute almost immediately arose as to whether the boundary line should be drawn through the Canal de Haro or the Rosario Straits. In 1869 a convention was negotiated by Reverdy Johnson and Lord Clarendon providing for the submission of the San Juan boundary dispute to the President of the Swiss Federation. The terms of this convention authorized the referee in case he

"should be unable to ascertain and determine the precise line intended by the words of the treaty * * * to determine upon some line which in his opinion will furnish an equitable solution of the difficulty and will be the nearest approximation that can be made to an accurate construction of the words of the treaty."[26]

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[25]See 1 Moore International Arbitrations 198, 210.

[26]The important provisions of the Convention of 1869 read as follows:

"* * * and whereas the commissioners appointed by the two high contracting parties to mark out that portion of the boundary which runs southerly through the middle of the channel aforesaid, have not been able to determine which is the true line contemplated by the treaty;

"The two high contracting parties agree to refer to the President of the Swiss Confederation to determine the line which, according to the terms of the aforesaid treaty, runs southerly through the middle of the channel which separates the continent from Vancouver's Island, and of Fuca's straits, to the Pacific Ocean.

ARTICLE II.

"If the referee should be unable to ascertain and determine the precise line intended by the words of the treaty, it is agreed that it shall be left to him to determine upon some line which, in his opinion, will furnish an equitable solution of the difficulty, and will be the nearest approximation that can be made to an accurate construction of the words of the treaty.

ARTICLE III.

"It is agreed that the referee shall be at liberty to call for the production of, and to consult, all the correspondence which has taken place between the American and British governments on the matter at issue, and to weigh the testimony of the American and British negotiators of the treaty, as recorded in that correspondence, as to their intentions in framing the article in question; and the referee shall further be at liberty to call for the reports and correspondence, together with any documents, maps,

The Johnson-Clarendon Convention was not approved by the Senate,[27] and the matter came up for adjustment in the negotiation leading up to the Treaty of Washington. During these negotiations the British Commissioners proposed compromise on a middle channel "generally known as the Douglas Channel."[28] This proposal was declined and it was decided to submit the matter to arbitration. Thereupon

"the British Commissioners proposed that the Arbitrator should have the right to draw the boundary through an intermediate channel. The American Commissioners declined this proposal, stating that they desired a decision, not a compromise."[29]

In accordance with the desire of the American Commissioners for a judicial decision the question was submitted in perfectly clear-cut form. The American claim of the Canal de Haro and the British claim of Rosario Straits were stated and the umpire was asked to decide "which of those claims is most in accordance with the true interpretation of the treaty of June 15, 1846."[30]

The award of the Emperor of Germany was precisely responsive to the question submitted. The Emperor's decision read as follows:

"Most in accordance with the true interpretation of the Treaty concluded on the 15th of June, 1846, between the Governments of Her Britannic Majesty and of the United States of America, is the claim of the Government of the United States that the

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or surveys bearing on the same, which have emanated from or were considered by the commissioners who have recently been employed by the two governments to endeavor to ascertain the line of boundary as contemplated by the treaty, and to consider all evidence that either of the high contracting parties may produce. But the referee shall not depart from the true meaning of the article as it stands, if he can deduce that meaning from the words of that article, those words having been agreed to by both parties, and having been inserted in a treaty ratified by both governments." Diplomatic Correspondence, 1868, Part I, 404.

[27] 1 Moore, International Arbitrations 224, citing Foreign Relations of U. S. 1873, Part 3, 376, 405.

[28] Foreign Relations of U. S. 1873, Part 3, 405.

[29] Foreign Relations of U. S. 1873, Part 3, 405-406.

[30] "And whereas, the Government of Her Britannic Majesty claims that such boundary line should, under the terms of the treaty above recited, be run through the Rosario Straits, and the Government of the United States claims that it should be run through the Canal de Haro, it is agreed that the respective claims of the Government of the United States and of the Government of Her Britannic Majesty shall be submitted to the arbitration and award of his Majesty the Emperor of Germany, who, having regard to the above-mentioned article of the said treaty, shall decide thereupon, finally and without appeal, which of those claims is most in accordance with the true interpretation of the treaty of June 15, 1846." Article 34 Treaty of Washington, 1 Treaties, Conventions 714 (1776-1909).

boundary-line between the territories of Her Britannic Majesty and the United States should be drawn through the Haro Channel."[31]

The *San Juan Boundary Arbitration* is an instance of an arbitration relating to that class of questions which of all others is most prone to breed compromise, namely, boundary disputes, submitted to a foreign sovereign (and the head of a state is perhaps of all arbitrators most under the temptation to compromise) and yet a clear-cut, judicial decision was obtained because the American negotiators who framed the terms of submission "desired a decision not a compromise," and said so in the treaty.[32]

Even with all possible care in making definite the terms of submission and with the utmost good faith on the part of the arbitrator, compromise will doubtless occasionally result. Such for instance was the case in the *Northeastern Boundary Arbitration* between the United States and Great Britain where sufficiently definite questions appear to have been submitted to the royal arbitrator and yet, nevertheless, the King of the Netherlands, acting upon the advice of Commissioners, to whom the case had been referred, practically confessed inability to answer the questions of construction submitted upon the evidence before him and recommended a compromise line. In this case, however, the perfect good faith of the arbitrator in stating the method by which his award had been reached enabled the United States, with the acquiescence of Great Britain, to decline to accept the award on the ground that it amounted to a departure from the terms of submission. Against possible bad faith or stupidity on the part of an arbitrator no care in framing the terms of submission can wholly provide, but the recent decision of the Hague Court in the *Orinoco Steamship* case, setting aside the award of the umpire of the United States and Venezuela Mixed Commission of 1903 in that case, on the ground that he had exceeded the terms of submission, suggests that arbitrators in the future who expect their decisions to stand, must at least make a rea-

[31]"Mit der richtigen Auslegung des zwischen den Regierungen Ihrer Britischen Majestät und den Vereinigten Staaten von Amerika geschlossenen Vertrages de dato Washington den 15ten Juni, 1846, steht der Anspruch der Regierung der Vereinigten Staaten am meisten im Einklange, dass die Grenzlinie zwischen den Gebieten Ihrer Britischen Majestät und den Vereinigten Staaten durch den Haro-Kanal gezogen werde." 1 Moore, International Arbitrations 230.

[32]For a detailed account of the San Juan Boundary Arbitration and the prior negotiations, see 1 Moore, International Arbitrations, Chap. VII, 196-237.

sonable showing of abiding by the terms of the submission from which alone they draw their authority.[33]

With respect to the selection of judges so much has been said that little can be added to any purpose. It has repeatedly been pointed out that nationals should be excluded from arbitral tribunals if compromise is to be avoided.[34] It has furthermore been pointed out that every effort should be made to exclude partisans from the tribunal, and as partisans, of course, should be excluded those judges who are prejudiced for or against either of the parties litigant or who have definitely made up their minds in advance upon any of the questions submitted.[35] It has been suggested that partisanship upon the bench might be eliminated by permitting the right of challenge in the selection of judges under the Hague Convention, as in the case of the selection of jurymen in our municipal courts.[36]

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[33]General Foster in speaking of the treaty for the arbitration of the Alaska boundary question, says:

"Experience had shown that the work of courts of arbitration and international commissions is not infrequently nullified or impaired by their members exceeding their powers in rendering their decisions, or by a departure from the terms of reference. In framing this treaty, we sought to avoid all error in this direction by the careful manner in which the points at issue were set forth." Diplomatic Memoirs, Vol. 2, p. 194.

[34]See Mr. Carter's letter to the Secretary of State quoted in an address of Hon. John W. Foster, Proceedings American Society of International Law, 1909, p. 29. See also Mr. Ralston's Address *supra*.

[35]* * * If the matter in controversy is important, so that defeat is a serious blow to the credit or the power of the litigant who is worsted, that interest becomes a more or less keen partisanship. According to their sympathies, men wish for the victory of one side or another.

"Such conflicting sympathies interfere most formidably with the choice of an impartial arbitrator. It would be too invidious to specify the various forms of bias by which, in any important controversy between two great powers, the other members of the commonwealth of nations are visibly affected. In the existing condition of international sentiment each great power could point to nations whose admission to any jury by whom its interests were to be tried it would be bound to challenge; and in a litigation between two great powers the rival challenges would pretty well exhaust the catalogue of the nations from which competent and suitable arbiters could be drawn. It would be easy, but scarcely decorous, to illustrate this statement by examples. They will occur to anyone's mind who attempts to construct a panel of nations capable of providing competent arbitrators, and will consider how many of them would command equal confidence from any two litigating powers." Lord Salisbury to Sir Julian Pauncefote, March 5, 1896, Foreign Relations of U. S., 1896, 222, 223.

[36]"We may be sure that when any nation to-day names judges for the trial of a case at the Hague in which it is concerned, it informs itself in advance, so far as propriety permits, as to whether those under consideration are friendly or unfriendly to the principle desired to be established, or prejudiced for or against the parties to the conflict, and whether they are honest and able. The result is that either side believes that it has named judges who are predisposed in its favor, or predisposed against its antagonist, or who are, at all events, competent. Exactly this course is taken by the trial lawyer in a hardly disputed case before a jury, with

It is submitted, however, that such an arrangement might easily operate as a similar right of challenge did operate in the English House of Common in making up committees to judge contested election cases where the process of challenging was familiarly referred to as "knocking the brains out of the committee." And, moreover, such a process might easily tend to create international misunderstanding and friction which it is the very purpose of arbitration to avoid. It is suggested that the benefits to be secured by the right of challenge could be largely obtained without these disadvantages if in every instance the parties litigant made an earnest effort to designate all the judges by "direct agreement" as suggested in article 46 of the Hague Convention of 1907, rather than by the more elaborate formula provided in the same article.[37] It is believed that if both parties litigant are really desirous of a capable and impartial tribunal selection by direct agreement would be the best of all methods available so long as resort is to be had to the present Hague Tribunal.

With respect to procedure, it is perhaps sufficient to point out that the provisions of the present Hague Conventions still leave much to the imagination of the tribunal and agents of the two litigating governments. There is no generally accepted system of pleading in international arbitration. There seems to be no agreement upon what the case (*Mémoire* of the Hague Convention) and counter case ought to contain. Under the present system, as it works out in practice, argument is mixed with the statement of the case and new evidence is introduced in the midst of oral argument, all with apparent impunity. There is no general understanding as regards such matters as discovery, interlocutory motions or order of argument.[38] And finally, the question of

one advantage in favor of the jury lawyer; he may challenge the prejudiced, the dishonest and the incapable, or those whom he believes to be under such heads. The same power should exist with regard to the Hague judges, although the reasons for challenge need not be stated whether the present system of nomination of trial judges be continued or whether the power of nominating them be placed in the hands of a neutral government, or whether they be selected by lot. We can readily conceive the selection by one country of a man who, for the soundest reasons, is an unfit judge, so far as the contesting nation is concerned, yet to challenge him, under present conditions would be embarrassing and probably ineffective." Address by Mr. Ralston *supra*, 13.

[37]The judges in the North Atlantic Coast Fisheries Arbitration between the United States and England were selected by direct agreement.

[38]See discussion as to procedure, order or argument etc. in the Pious Fund case, Foreign Relations of U. S., Appendix 1902, 506-516. With respect to interlocutory motions see Orinoco Steamship case before the Hague Tribunal (1911), American Journal of International Law 35, 55-59.

language remains one of the most serious practical questions connected with international arbitration.[39] It is submitted that irrespective of what may be thought as to the advisability of the codification of substantive international law[40] that the framing of at least a simple code of arbitral procedure is one of the present needs of international arbitration and one of the most effective steps which can be taken to eliminate compromise.

One further matter of procedure, directly affecting the tribunal seems to be worthy of more attention than it has received. Arbitral tribunals generally, and the various tribunals sitting under the Hague Conventions in particular, have striven valiantly for unanimity. The President of the British-Guiana boundary tribunal, one of the worst offenders in the matter of compromise, in his closing remarks laid special stress upon the unanimity of the decision in that case which he contrasted favorably with the division in the courts which decided the *Alabama* and *Behring Sea Arbitration*.[41] And Sir Richard Webster (now Lord Alverstone), counsel for Great Britain, followed the President in a similar strain.[42]

In his remark at the close of the *Pious Fund Arbitration* the President of that Tribunal also expressed the opinion that the unanimity with which the tribunal had arrived at its decision was

[39]See "The Orinoco Steamship Company Case Before the Hague Tribunal" (1911) American Journal of International Law 59-62, for a statement as to the disposition of the question of language in the various cases in which the United States has been a party.

[40]And to the writer there appear to be serious objections to the general codification of substantive international law.

[41]"Si vous vous rappelez les différents cas soumis à des Tribunaux d'Arbitrage jusqu'ici; en 1873, à Genève, dans l'affaire de l'Alabama; en 1893, à Paris, dans l'affaire des Pêcheries de la mer de Behring, toujours vous verrez, les sentences rendues seulement à la majorité; et vous verrez aussi qu'il y a toujours eu des dissidences parmi les arbitres.

"Ici nous avons eu le bonheur d'avoir l'unanimité sur tous les articles de la sentence, sans aucune reserve.

"Permettez-moi de croire que, dans les conflits internationaux et dans la question de l'Arbitrage, cette unanimité est un immense bien: * * * c'est là un idéal vers lequel il faut tendre; parce que, s'il y a force légale pour les Puissances en litige dans une sentence arbitrale adoptée à la majorité, il y manque cette force morale qui est d'un bien autre prix encore." 11 Proceedings, British-Guiana-Venezuela Boundary Arbitration 3239-3240. extract from closing remarks of F. de Martens, President of the Tribunal.

[42]"And, Sir, I do feel that in the interests of Arbitration in general and in the interests of the cause of peace it must be a great satisfaction to everyone concerned, that this Tribunal has been able to arrive at a unanimous decision. It must commend its judgment to the two nations engaged and it must be a happy presage for possible decisions in the future." Closing remarks of Sir Richard Webster, 11 Proceedings, British-Guiana-Venezuela Boundary Arbitration 3240.

a guarantee of the correctness of its conclusions.[43] Professor Matzen, however, was able to say in that case that "each judge for himself and all together" had arrived "at the same conclusion." When this truly can be said, unanimity is indeed persuasive of the correctness of the decision reached and of the arguments upon which it is founded.

But it is believed that too often in the history of arbitration unanimity has been purchased at the price of mutual concession—of compromise,—and of the subtlest and in some respects the most injurious of all forms of compromise, namely, compromise as to the reasons given for the decision, reasons which may affect not only the particular arbitration in question but the development of international law. Unanimity purchased by the emasculation and befogging of the opinion of the court comes at too high a price.

Dr. Drago's clear-cut dissenting opinion on question five of the *North Atlantic Coast Fisheries* case, irrespective of the merits of the conclusion which he reaches, is, it is believed, one of the most hopeful incidents in the recent history of arbitration.

Article 52 of the Hague Convention of 1899 requires the award to be "drawn up in writing and signed by each member of the tribunal," whereas, according to the present Hague Convention (Art. 79) it is merely required that the award be "signed by the President and registrar, or by the secretary acting as registrar."

It is submitted that this change is unfortunate.[44] It is much

[43] "S'il n'est donné à aucun Tribunal humain de savoir ses sentences infaillibles, nous emporterons du moins d'ici la ferme conviction d'avoir recherché la vérité de toutes nos forces, consciencieusement et impartialment; et il me sera permis d'adjouter que l'unanimité avec laquelle tous les Membres du Tribunal appartenant à différents pays réunis ici à la Haye sont arrivés, chacun pour soi et tous ensemble, aux mêmes conclusions, me semble constituer une garantie de plus que dans notre recherché empressée de la vérité nous n'avons pas fait fausse route." Foreign Relations of U. S., Appendix, 2, 1902, 878. Extract from closing remarks of Prof. Henning Matzen, President of the Tribunal at the Session of October 14, 1902.

[44] The reasons for this change are explained as follows in Baron Guillaume's report on the Hague Convention for the Pacific Settlement of International Disputes rendered to the Conference in Plenary Session:

"La Délégation des Pays-Bas avait demandé la suppression du second alinéa de l'article 5 de la Convention de 1899.

"M. Loeff a exposé les motifs qui militent en faveur de cette modification, destinée à empêcher les membres du Tribunal de constater leur dissentiment. Cette disposition est, pour lui, en opposition avec un des grands principes fondamentaux de la procédure arbitrale, qui exige que la sentence soit une décision définitive, *omni sensu*, non seulement dans ce sens qu'il n'y ait pas d'appel proprement dit à un second Tribunal, mais aussi dans cet autre sens que la décision n'évoque plus de discussions ultérieures en dehors de l'enceinte du Tribunal.

easier for a judge to silently acquiesce in a compromise opinion which is entirely satisfactory neither to him nor to any one else, than it is to sign his name to such an opinion. It is suggested that future agreements for arbitration should require, as did the special agreement in the *North Atlantic Coast Fisheries Arbitration*[45] that the opinion and award be signed by every arbitrator assenting thereto. And it is suggested that it might even be well to go further and require a specific statement in the opinion that not only the result but the reasoning in the opinion is concurred in by all who sign.

Finally it is suggested that in addition to the limited right to revision secured by the present Hague Convention and in addition to the right to disregard and have judicially annulled a judgment which has disregarded the terms of the submission (a right which has just been vindicated by the Hague Tribunal)[46] it is worthy of serious consideration whether or not the next Hague Conference should not make some provision for appeal in certain

"La procédure arbitrale doit avoir la confiance absolue des peuples et éviter tout ce qui pourrait la miner. En permettant aux membres qui sont restés en minorité, de constater leur dissidence, on ressuscite au dehors du Tribunal un litige qui aurait dû être enterré dans son enceinte; on ouvre de nouveau les discussions, et l'on s'expose au danger d'éveiller des soupçons sur les mérites de la sentence.

"Le Comité n'a pas méconnu la justesse de ces critiques, tout en observant qu'il serait peut-être assez dur d'exiger des juges, dont la sentence ne rend pas la pensée, de devoir y apposer leur signature sans pouvoir constater leur désaccord.

"Nous avons ésperé obvier à ces difficultés par l'adoption d'une disposition qui n'impliquerait plus la signature de la sentence par tous les arbitres. Seul, le President du Tribunal signerait le jugement avec le greffier ou le secrétaire faisant fonctions de greffier." *Deuxième Conference Internationale de la Paix* (1907); *Actes et Documents*, 1: 437.

[45]"It shall be made in writing and dated and signed by each member of the Tribunal and shall be accompanied by a statement of reasons." Art. 10. Treaties, Conventions, 840 (1776-1909).

[46]In stating the reasons which induced the United States to insist upon the submission of the Orinoco Steamship Co. Case to the Hague court, Secretary Knox said:

"Indeed, the United States has taken even more advanced ground and has said that, inasmuch as arbitration is thus, as stated, a judicial rather than a diplomatic procedure, the judgment of an arbitration court must conform to the principles of law and equity involved and controlling, and that where, in its opinion, it is wholly clear and evident that a decision essentially fails so to conform, such decision should be open to an international judicial revision. It is in accordance with this principal that the United States and Venezuela have recently negotiated a protocol of arbitration providing for the submission to The Hague of the question of the revision of an international award."—"The Spirit and Purpose of American Diplomacy," by Hon. Philander C. Knox, Secretary of State of the United States, an address delivered at the Commencement Exercises of the University of Pennsylvania, June 15, 1910, p. 9.

cases for the correction of error similar to that which has been found necessary in municipal law. A precedent for such provision indeed can be found in the unratified Olney-Pauncefote Treaty of 1897.

It is submitted that with care in the framing of the terms of submission, direct agreement as to the selection of the judges, a simple, clear code of arbitral procedure, maintenance and amplification of the right of revision, and the right to set aside an award which disregards the terms of submission, together with provision for appeal in proper cases for the correction of error, compromise may be largely banished from international arbitration, even before the establishment of a permanent court of arbitral justice.

WM. CULLEN DENNIS.

WASHINGTON, D. C.